

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ALSEA VALLEY ALLIANCE, et al.,

Case No. 06-6093-HO

Plaintiffs,

ORDER

v.

CONRAD C. LAUTENBACHER, et al.,

Defendants.

Defendants and defendant-intervenors Trout Unlimited et al. (Trout Unlimited) filed motions to dismiss the complaint in intervention filed by plaintiff-intervenors Astoria Fishermen, for failure to comply with notice to sue provisions of the Endangered Species Act (ESA).

Discussion

No action to enjoin any person, including the United States or any agency, who is alleged to be in violation of Chapter 35 of Title 16, United States Code, may be commenced "prior to sixty

days after written notice of the violation has been given to the Secretary [of Commerce], and to any alleged violator" 16 U.S.C. § 1540(g)(2)(a). Compliance with Section 1540(g)(2)(a) is a jurisdictional prerequisite to filing suit. Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998).

Cases interpreting the similar notice provisions of the Clean Water Act (CWA) are instructive. Southwest Ctr., 143 F.3d at 520. Astoria Fishermen may not rely on plaintiff's notice (TU ex. 2) which does not identify them. See Washington Trout v. McCain Foods, Inc., 45 F.3d 1351, 1354-55 (9th Cir. 1995) (Clean Water Act); see also New Mexico Citizens for Clean Air and Water v. Espanalo Mercantile Co., Inc., 72 F.3d 830, 833 (10th Cir. 1996) (Clean Water Act). In the alternative, plaintiffs' notice does not set forth Astoria Fishermen's claim that the Lower Columbia River Coho listing decision is invalid based on population numbers, so as to permit defendants to act on the merits of the claim prior to judicial review. ONRC Action v. Columbia Plywood, Inc., 286 F.3d 1137, 1144 (9th Cir. 2002). The court lacks subject matter jurisdiction over the claim of Astoria Fishermen.

Conclusion

Based on the foregoing, Trout Unlimited's motion to dismiss [#83] and defendants' motion to dismiss [#93] are granted. The

complaint in intervention is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED this 14th day of March, 2007.

s/ Michael R. Hogan
United States District Judge